United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

75-7140

B

RALPH METZGER, JR., ADELE METZGER, and RALPH METZGER, III, an infant under 14 by his parent, Ralph Metzger, Jr.,

Plaintiffs-Appellants,

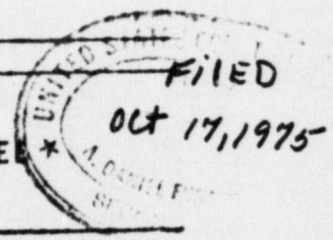
-against-

THE ITALIAN LINE,

Defendant-Appellee.

P/S

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK



BRIEF OF DEFENDANT-APPELLEE

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BRIEF OF APPELLEE

QUESTIONS PRESENTED

I. (a) - Is the shipowner liable for injuries received by passengers in an automobile accident on shore when the passengers refused shore excursions offered by the shipowner and personally hired on shore the offending vehicle operated by an independent contractor?

(b) - Can there be a duty on the part of a shipowner to warn passengers that some vehicles being offered for taxi hire on shore may not be licensed for commercial use, despite the fact that the local government holds operators of both licensed taxis and private cars to the same standards of driver safety and competency?

II. Can a shipowner lacking surgeons or surgical facilities on board be held liable for the refusal to repatriate on its vessel passengers who were injured on shore with a possible requirement of abdominal surgery, in conformance with all available medical advice when there were surgeons and surgical facilities available on shore?

STATEMENT OF THE CASE

Defendant's motion for summary judgment based upon depositions of the plaintiffs and various affidavits was granted by the Court below and plaintiffs' appeal.

A. (All facts under this sub-section A. are stated by plaintiffs in affidavits or depositions as referenced in the Appendix).

Plaintiffs, Ralph Metzger, Jr., his wife Adele Metzger and their then infant son, Ralph Metzger III, boarded the SS LEONARDO DA VINCI (owned by defendant) for a Caribbean cruise leaving New York on December 20, 1969. At the last port-of-call, Montego Bay, Jamaica, plaintiffs went ashore and were injured in an automobile accident near the town of Duncans. About noon, on December 30, 1969, plaintiffs left the vessel via tender for a dock called Fletchers Wharf at Montego Bay, Jamaica, where they went ashore (121a, 125a). The defendant had offered shoreside tours to its passengers, but plaintiffs preferred to make their own arrangements for a shore excursion (94a, 95a, 121a). On shore, Mr. Metzger approached a uniformed Jamaican Tourist Board official and was told by him to make his own "deal" in hiring a taxi for a desired trip to Ocho Rios (124a, 125a, 126a). There were several cars or taxis available on the street near the Jamaica Tourist Board official (126a, 127a, 194a, 214a), but allegedly to plaintiffs' knowledge at the time, the commercial taxis

were not distinguishable from the private vehicles and he later learned the commercial taxis bore a red plate marked "PPV" in addition to the regular license plate (132a-135a).

Mr. Metzger made arrangements with a Mr. Godwin Johnson to drive his family to Ocho Rios and return for $30.00 and he later discovered that Mr. Johnson's car was not a licensed commercial taxi (125a, 126a, 129a, 190a). No Italian Line agents or employees were in the vicinity at the time Mr. Metzger made arrangements for car hire (213a). Plaintiffs were driven in the hired vehicle from Montego Bay in the direction of Ocho Rios (136a, 137a). At about 1:15 P.M. plaintiffs' hired vehicle became involved in a multiple car accident about 28 miles from Montego Bay (137a, 138a). All three members of the Metzger family were injured and taken to the nearest hospital in Falmouth where they were examined and given first aid treatment (143a, 145a). The infant son, Ralph Metzger III, had suffered abdominal pain following the accident and he had difficulty walking and turning in bed (197a, 198a). Dr. Berry at Falmouth Clinic told Mr. Metzger to see whether there was a surgeon on the LEONARDO DA VINCI because his son might be bleeding internally (154a, 155a). Mr. Metzger returned to the dock in Montego Bay and spoke to the ship's doctor (Dr. Nobis), who accompanied him back to Falmouth Hospital with a ships nurse (156a-158a, 160a).

Prior to Mr. Metzger's returning to the vessel, Dr. Berry wrote his diagnosis of the injuries on the reverse side of his professional card at Mr. Metzger's request (158a, 160a). This card was shown to the ship's doctor, Dr. Nobis, by Mr. Metzger (159a). Dr. Nobis told plaintiffs they could not return to the vessel and that they were better off remaining in Jamaica (158a-163a). Mrs. Metzger and Ralph Metzger III were subsequently transferred by ambulance from Falmouth to St. James Hospital in Montego Bay and Mr. Metzger followed his family to that hospital (165a-167a). Plaintiffs were repatriated to New York by air on January 5, 1970, arriving on January 6, 1970 (145a, 146a). The ship was due in New York on January 2, 1970 (162a).

B. (The material under this sub-section B. are facts appearing in defendant's affidavits not successfully controverted in any material detail by plaintiffs and therefor deemed admitted).

Under the Road Traffic Law of Jamaica, licensed drivers of private vehicles must pass the same tests for safety and ability as drivers of vehicles for hire (65a-74a).

At the Falmouth Clinic, Dr. Berry decided the son, Ralph Metzger III, should not be returned to the vessel but should be transferred to St. James Hospital in Montego Bay for observation or surgery, if required (60a).

Dr. Harland Hastings, then of St. James Hospital staff in Montego Bay, examined plaintiffs and concluded that neither Mrs. Metzger, nor her son should be repatriated by ship on the date of the accident and concluded the infant son might have internal injuries which could require surgery (62a-64a). Both doctors were aware there was no qualified surgeon on board the vessel (61a, 63a).

The ship's physician, Dr. Rodolfo Nobis, visited plaintiffs at Falmouth and conferred with Dr. Berry. They agreed that because of abdominal pain, the Metzger boy should remain at the hospital in Montego Bay for observation because of the possibility of internal injuries. Dr. Nobis also concluded Mrs. Metzger would be better off remaining in the shore hospital. Neither Dr. Nobis nor the other ship's doctors were qualified surgeons and the LEONARDO DA VINCI was not equipped for abdominal surgery (57a-59a).

POINT I.

DEFENDANT-SHIPOWNER IS NOT LIABLE TO PLAINTIFF-PASSENGERS INJURED ON SHORE BY NEGLIGENCE OF AN INDEPENDENT CONTRACTOR HIRED BY PLAINTIFFS AND DEFENDANT HAD NO DUTY TO WARN OF UNKNOWABLE OR NON-EXISTENT DANGERS ON SHORE.

Based upon plaintiffs' testimony there can be no doubt

that on a street in Montego Bay and entirely independently of defendant's agents or employees, they hired a Jamaican driver and his car for a shore excursion of their own. Plaintiffs apparently engaged a driver whose vehicle was not licensed for hire as a taxi, but which was a private car. (It is conceded for this argument that Mr. Metzger was unaware at the time the hired vehicle was not licensed as a commercial taxi).

Plaintiffs' attorney claims in his brief that defendant owed a duty "to warn of known dangers ashore" and to warn of the "taxi conditions ashore" which plaintiff would "encounter at the wharf". The apparent innuendo is that taxis for hire were under the wharf operator's control (plaintiffs' brief p. 7,8). However, the taxis and cars were not on the wharf but on the street (214a).

Plaintiffs admitted defendant had offered a shore excursion through its cruise director, but preferred to make their own arrangements. Thus, the driver responsible for plaintiffs' injuries was an independent contractor, having no relationship to the defendant and wholly outside its control.

The affidavit of the Jamican attorney, Mr. Paul Edmund Levy, and the attached copies of Jamaican traffic laws make it abundantly clear that all licensed drivers in Jamaica, whether of private or commercial vehicles, must pass identical driver's tests in respect of safety standards and degree of competency required. (Clearly,

any system of dual standards would be irrational when all vehicles use the same thoroughfares). The "known danger", against which it is apparently claimed defendant should have warned plaintiffs, was an unknown driver of a private vehicle presumed by law equally qualified and as safe as a driver of a commercial taxi. Plaintiffs' attorney has not offered any evidence whatsoever by affidavit or otherwise opposing Mr. Levy's presentation of the Jamaican law on the subject and it must therefor be deemed admitted. It follows that there was no "known danger" to plaintiff of which defendant had a duty to warn. Without a duty and breach thereof, axiomatically there can be no negligence.

There is no claim or suggestion by plaintiffs that the driver they hired was other than an independent contractor, nor that he had any relationship whatsoever with defendant. It is therefore unnecessary to find a written contract "expressly releasing the carrier" (plaintiffs' brief p. 14). An oral contract for hire was admittedly entered between plaintiffs and the Jamaican driver on shore independently of the vessel as testified to by plaintiffs. Under those admitted facts, defendant had no duty to warn the plaintiffs, Feig v. American Airlines, Inc., 167 Fed. Supp. 843 (D.D.C. 1958). (In that case the plaintiff was on a round-trip ticket with a land tour purchased through the defendant, hence the existence of an express release.) See also Stewart Taxi Service Co. v. Spencer, 149 Md. 635, 132 A. 153 (1926); Anda v. Chicago D & G B Transit Co., 231 Mich.

567, 204 NW 761.

In cases involving passenger injuries on shore decided against defendant shipowners, a distinguishing common factor is retention of control or supervision by the defendant or its agents, Thurston v. Northern Nav. Co., 205 Mich. 278, 171 NW, 423 (1919); James Lawlor v. Incres Nassau S.S. Line, 161 Fed. Supp. 764 (D. Mass 1958); Shulman v. Compagnie Generale Transatlantique, 152 Fed. Supp. 833, 1957 AMC 2032 (SDNY 1957); Stevenson v. Four Winds Travel, 462 Fed. 2d. 899, 1972 AMC, 2525 (5th Cir.); and under the doctrine of respondeat superior where defendant selected the taxi driver, Casey v. Sanborn's Inc. of Texas, 478 SW 2d. 234 (Tex. 1972). No case has been found wherein the shipowner has been held liable to a passenger injured on shore where, as in the instant case, the tort feasor was a third party without relationship to the shipowner and having the status of an independent contractor.

POINT II.

DEFENDANT IS NOT LIABLE FOR REFUSING REPATRIATION OF INJURED PASSENGER IN CONFORMANCE WITH ALL AVAILABLE MEDICAL ADVICE AND IN ANY EVENT IS NOT LIABLE FOR NEGLIGENCE OF SHIP'S DOCTOR.

In plaintiffs' brief it is claimed that affidavits in support of the motion are not made with personal knowledge and therefore do

not qualify under Rule 56(e). The affidavits of Doctors Nobis, Berry and Hastings are obviously all made with personal knowledge; the affidavit of Dr. Balensweig is that of a medical expert who examined two of the plaintiffs and based his opinion of their treatment in Jamaica upon admitted facts; the affidavit of the Jamaican attorney Mr. Levy is based upon his personal knowledge of the traffic laws of Jamaica germane to plaintiffs' claims. None of these affidavits have been contradicted by competent, material evidence.

Plaintiffs' attorney, at page 9 of his brief, urges the existence of disputed "factual issues" regarding the affidavits of Doctors Berry, Hastings and Nobis. A review of the record discloses several attempts by plaintiffs to create issues without factual basis which are discussed and numbered as follows:

1. Mr. Metzger testified Dr. Berry said both his wife and son would be better off on the ship and indicated they were sent to St. James Hospital only because the vessel refused repatriation (167a). The admitted facts were that Dr. Berry told Mr. Metzger he "wanted to be sure there was a surgeon on the ship because he (son) might be bleeding internally" (154a). Dr. Berry sent Mr. Metzger to verify the presence of a surgeon on board (154a, 155a). The

only logical conclusion permitted by such testimony is that Dr. Berry would have advised repatriation only if surgery could be performed on board because of the possibility of internal injury. This is confirmed by Dr. Berry's affidavit and is not controverted by competent evidence in any material detail.

2. Mrs. Metzger claims that Dr. Berry examined her son and "at no time" stated to her or her husband that it would be necessary to remain at any (shoreside)hospital; that Dr. Berry "at no time" mentioned any possibility of a ruptured spleen; that the "key symptom of shock" was absent on Dr. Berry's card which he gave to her husband (76a, 84a). Whether or not Dr. Berry informed her directly it would be necessary to remain on shore is immaterial, because Dr. Nobis stated this and Mrs. Metzger heard it (162a). Whether Dr. Berry specifically told Mrs. Metzger of the possibility of a ruptured spleen is also immaterial because of plaintiffs' Exhibit I, (Dr. Berry's card given to Mr. Metzger) which reads: "(2) son (?) # spleen with (illegible) peritoneum not shocked at present". This exhibit offered by plaintiffs is supported by the affidavits of Dr. Nobis and of Dr. Berry and by the testimony of the plaintiffs' own son concerning his abdominal pain and bruises. The phrase "not shocked at present" does not affect the son's complaints of pain, nor negate the possibility of abdominal injury. Mr. Metzger specifically requested Dr. Berry write his diagnosis

on his card (158a) for the express purpose of showing it to Dr. Nobis (159a, 160a).

3. Mrs. Metzger claims Dr. Berry intended to return plaintiffs to the vessel and solely because of Dr. Nobis' refusal he agreed to the only alternative (77a). But plaintiffs cannot ignore Dr. Berry's written diagnosis and his request of Mr. Metzger to see if a surgeon was on board which, without question, indicates the final decision involved Dr. Berry and was not an arbitrary, unwarranted refusal by Dr. Nobis' acting alone. Plaintiffs statements as to what was "intended" by Dr. Berry in any event is inadmissible.

4. Mrs. Metzger's claim of a "misstatement of fact" as to what was said between Doctors Berry and Nobis is immaterial because she was not present during conversations between the two doctors (78a).

5. The claim by Mrs. Metzger (79a) that Dr. Berry made no decision and said the vessel would provide for her comfort and convenience is made without regard to his stated concern about surgery on board and apparently prior to a later conversation between Dr. Berry and Dr. Nobis. In the context of facts admitted by plaintiffs, viz.: Dr. Berry's card, the Metzger son's physical complaints for a day following the accident and Mr. Metzger's testimony concerning Dr. Berry's voiced concern about possible internal

bleeding and surgery on board, it is immaterial as to whether Dr. Berry or Dr. Nobis, or both made the final decision not to return plaintiffs by ship. It is clear, that through whatever means, there was a meeting of minds among the doctors and plaintiffs have offered no competent or material evidence to refute this.

6. The fact that there may have been passenger-physicians on board who might treat plaintiffs was deservedly considered a frivolous suggestion by the court below. The question as to whether there were such doctors, their qualifications and specialities and indeed their willingness to undertake abdominal surgery at sea, particularly without proper equipment, cannot seriously be entertained as a viable issue.

7. The fact that Dr. Nobis was listed as Chief Surgeon on the staff of the vessel is immaterial because it is obviously the title of a staff billet rather than a holding out to plaintiffs of his specialty. Plaintiff did not rely, nor indeed were they permitted to rely, upon Dr. Nobis' title of surgeon. Dr. Nobis himself denied being a surgeon and acted accordingly.

8. There are no material issues in dispute with

regard to plaintiffs' treatment ashore (80a). It has been admitted by the son, Ralph Metzger III, that he had bruises all over and could not walk or turn in bed for about a day (197a) and he claimed related urinary problems (175a, 198a). If, as claimed by Mrs. Metzger, her son was ambulatory and permitted outside St. James Hospital it could only mean his pain had subsided. In that event there then would have been no need for observation or expert surgical care.

9. Dr. Hastings "understood" there was no surgeon on board the vessel (81a). Because he had no personal knowledge of that fact hardly places his opinion in the category of a disputed fact question material to plaintiffs' cause of action against the shipowner.

10. Plaintiffs' complaints of treatment or the lack thereof at St. James Hospital in Montego Bay (80a), does not controvert defendant's evidence (Dr. Hastings' affidavit) that there were qualified surgeons and expert surgical care available there.

Complaints of poor food and lack of attentior at the hospital cannot be the subject matter of plaintiffs' action. Plaintiffs admittedly refused the ship's offered shore excursion; they were injured by their own hired servant some 28 miles from the vessel; Dr. Berry became their physician because of circumstances

certainly beyond control of the defendant. The defendant's Dr. Nobis never accepted treatment, but refused it for stated professional reasons. Plaintiffs have not contradicted Dr. Nobis' stated lack of qualifications as a surgeon with any competent evidence, nor have they claimed they relied upon the title of Chief Surgeon for any purpose. Plaintiffs have not offered any evidence that there should have been a qualified surgeon on board and indeed no such requirement is known to exist. Based upon the above uncontradicted facts, plaintiffs' claim of poor treatment at St. James Hospital is immaterial and not germane to this action.

11. The Court's attention is respectfully referred to Plaintiffs' Exhibit III (8a). While the ship's deck plan does not include a hospital or infirmary area, there is no operating room or surgery. Therefore, Dr. Nobis' uncontradicted statement that the ship was not equipped for abdominal surgery must stand.

It is therefor respectfully submitted that upon facts stated under oath by plaintiffs and those facts not successfully refuted by them, Dr. Nobis had no alternative to refusal of repatriation on the vessel under the circumstances.

Even if it be assumed Dr. Nobis could be found negligent in not accepting plaintiffs on board, defendant could be

held liable only on a showing by plaintiffs that it was negligent in their selection of Dr. Nobis as a physician. There has been no such showing or any attempt by plaintiffs to offer such evidence. Even if a ship's doctor errs in his treatment or judgment, it does not prove his incompetency, nor that the shipowner was negligent in hiring him: The Korea Maru, 254 F. 397 (9th Cir. 1918); Churchill v. United Fruit Co., 294 F. 400 (1 Cir., 1923); Branch v. Compagnie Generale Transatlantique, 11 F. Supp. 832 (SDNY 1935); O'Brien v. Cunard Steamship Co., 154 Mass. 272, 28, N.E. 266; The Great Northern, 251 F. 826 (9th Cir. 1918); Laubheim v. De K.N.S. Co., 107 N.Y. 228, 13 N.E. 781 (1887); Amdur v. Zim Israel Navigation Company, 310 F. Supp. 1033 (SDNY 1969).

In plaintiffs' brief (pp. 9-10) it is argued that defendant has presented no affidavit related to issues of fact required by Amdur v. Zim Israel Navigation Company (supra) and that defendant has submitted no facts concerning the shipowner's responsibility for its doctor as set forth in Nietes v. American President Lines, Ltd., 188 Fed. Supp. 219 (N.D. Cal. 1959). On the contrary, there has been no showing whatsoever by plaintiffs that defendant did not supply a competent physician unless it is to be found in the fact that its physician, Dr. Nobis, refused repatriation. But there has been abundant evidence offered by defendant as to the reasons for such refusal (no surgeon and no surgical facilities on board) which

plaintiffs have failed completely to controvert. It is submitted it is the law in this circuit that a physician's error does not prove his incompetency, nor does it prove that the shipowner was negligent in hiring him.

The holding in the Nietes case, that a ship doctor's negligence in treatment of a passenger can be imputed to the shipowner, urged by plaintiffs as "expressing the more modern view", even if accepted arguendo as binding on this court, would not apply to the facts here. In Nietes, the court said at page 221:

> "A carrier is under no duty to practice medicine, and a shipowner is under no duty to provide medical facilities or hospital services to passengers, either by statute or common law, except where passengers ride in steerage. . . . But, when a carrier undertakes the treatment of illness through medical services, provided by it aboard ship, it assumes the duty to treat carefully."

In the instant case, there is no treatment by the ship's doctor, negligent, or otherwise. Here, the ship is in port with surgeons and surgical facilities available ashore. Here, refusal to treat (the only possible negligence) is grounded upon the greater protection and safety of plaintiffs. The fact of better medical facilities on shore has not been successfully controverted. Thus, it is submitted that even if the California court's decision in

Nietes were binding on this court, it could not be determinative on these facts.

CONCLUSION

Plaintiffs have admitted under oath they independently hired their own driver who had no relation whatsoever to the defendant and that they were injured by the sole negligence of that independent contractor on shore 28 miles from the vessel. There has been no refutation by plaintiffs of defendant's evidence that all Jamaican drivers had to pass the same tests with regard to competency, and that fact must be deemed admitted. There has been a total failure on the part of plaintiffs to offer any evidence that defendant knew or should have known that the offending driver hired by plaintiffs would or might be negligent. Plaintiffs have failed utterly to controvert defendant's contention that Dr. Nobis was not qualified as a surgeon and that the vessel was not equipped for abdominal surgery. Plaintiffs have offered no material evidence, medical or otherwise, to show refusal of repatriation by defendant was negligent. Plaintiffs have failed to even attempt a showing that defendant was negligent in hiring Dr. Nobis. Thus plaintiffs have been totally unable to demonstrate a triable issue of fact exists or that there is a cause of action.

On a motion for summary judgment, facts offered by the moving party which are not refuted or controverted by evidence which would be considered competent at trial is deemed to be admitted and plaintiffs must oppose by the same type of material as are open to movant, Moore's Federal Practice, par. 56.15 (3).

This Court stated in Community of Roquefort v. William Faehndrich, Inc., 303 Fed. 2d. 404, (2d Cir. 1962): ". . .the Rule 9(g) statement is not a substitute for affidavits alleging facts . . .". In that case, at page 498, this Court said: "However, summary judgment cannot be defeated where there is no indication that a genuine issue of fact exists; to permit that would be to render this valuable procedure wholly inoperative and to place 'a devastating gloss' on the rule".

Plaintiffs "must adduce factual material which raises a substantial question of the veracity, or completeness of the movant's showing or presents countervailing facts"; and the rule "that summary judgment may not be rendered when there is the 'slightest doubt' as to the facts no longer is good law", Beal v. Lindsay, 468 Fed. 2d 287, 291 (2d Cir. 1972). Plaintiffs have not met these requirements and have failed to establish a cause of action.

The defendant urges that the decision of the Court below granting summary judgment in this case in all respects be affirmed.

Respectfully Submitted,

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SERVICE OF 2 COPIES OF THE WITHIN

Appellee's Brief

IS HEREBY ADMITTED.

DATED: 10/11/55 12:50 P.M.

Herbert Kaplow Esq

Attorney for Plaintiffs-appellants